IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE	§	
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SEATCO, INC.,	§	**Case No: 00-37332-BJH-11**
	§	
Debtor.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is CIT Group/Business Credit, Inc.'s Emergency Motion for Stay Pending Appeal (the "Motion"). Pursuant to Bankruptcy Rule 8005, CIT[1] must present its request for a stay pending appeal to this Court in the first instance. The Motion was filed on February 21, 2001 and was heard by the Court on February 22, 2001. CIT offered no evidence in support of the Motion. The Debtor filed a written response shortly before the hearing in opposition to a stay pending appeal and offered the testimony of two witnesses regarding the adverse affects of a stay on the Debtor. Pursuant to Federal Rule of Civil Procedure 52, made applicable here by Bankruptcy Rule 7052, the Court's findings of fact and conclusions of law with respect to CIT's requested stay pending appeal are set forth below.

1. There is no disagreement regarding the criteria to be applied to determine whether a stay pending appeal should be granted. Those four criteria are whether: (1) the movant has shown a likelihood of success on the merits; (2) the movant has shown irreparable injury if the stay is not granted; (3) granting the stay would not substantially harm the other parties; and (4) granting the stay would serve the public interest.

[1]Capitalized terms not defined herein shall have the meaning ascribed to them in the Memorandum Opinions previously issued by the Court in connection with this contested confirmation hearing.

2. With respect to the first criteria, CIT contends that a stay pending appeal is proper with a showing of either a high likelihood of success and some injury or a showing that the appeal involves substantial legal issues if substantial injury is involved. On this record, the Court finds that CIT satisfies neither standard.

a. CIT raises no new issues on appeal. Each of the issues raised by CIT was briefed and argued by the parties and was fully addressed in one or more of the prior Memorandum Opinions of this Court. Many of the issues are factual in nature and the Court is satisfied that its findings of fact are supported by a preponderance of the evidence and are not clearly erroneous. Moreover, each of the legal issues raised was decided based upon the plain meaning of the Bankruptcy Code, substantial legal authority, or both. CIT has neither a high likelihood of success in connection with its appeal nor are the issues raised substantial. For example, the two issues most vigorously argued by CIT are issues surrounding the injunction provisions of the Further Modified Plan and the cramdown of the Further Modified Plan over CIT's objections.

With respect to the injunction, the Court made detailed findings of fact in its Memorandum Opinions concerning the propriety of the temporary injunction; and, with respect to the legal issues, as the Court noted in its Original Memorandum Opinion, the Fifth Circuit has recognized that circumstances may arise where temporary injunctions like the one at issue here would be appropriate. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5^{th} Cir. 1995).

With respect to the cramdown issues, the Court has repeatedly asked CIT if it had any authority to support its contentions. Until the day of the hearing on the Motion, CIT has been unable to cite any such authority. As the Court noted in its most recent Memorandum Opinion, this absence of authority was not particularly surprising since the plain meaning of several relevant provisions of the Bankruptcy Code compels a different conclusion than that advanced by CIT. Similarly, CIT did not cite any authority in the Motion that was directly on point. However, at the hearing on the Motion, CIT cited two cases that it contends establish either a high likelihood of success on appeal or that it is raising a substantial legal issue in its appeal. After analyzing each of these cases, and noting that they do address the issue of when a plan of reorganization can be confirmed over the objection of a secured creditor, the Court concludes that neither holding supports CIT's position here. Each case will be addressed separately.

In *Corestates Bank, N.A. v. United Chem. Techs., Inc.,* 202 B.R. 33 (E.D. Pa. 1996), the debtor confirmed a plan over the objection of Corestates Bank (the "Bank") under § 1129(b)(2)(A)(i) based upon the bankruptcy court's determination that the Bank was retaining its liens and receiving deferred cash payments with a present value equal to the Bank's allowed secured claim. The district court reversed and remanded the case to the bankruptcy court because it concluded that the Bank was not retaining its liens under the debtor's plan and, as a result, the plan did not satisfy the fair and equitable test of § 1129(b)(2)(A)(i).

The district court's conclusion is not surprising because the fact that the Bank was not retaining its liens on certain machinery and equipment under the debtor's plan was undisputed. The bankruptcy court concluded that although the Bank did not retain its liens on the machinery and equipment, the cash it received on the effective date of the plan reimbursed it for these lost liens. The district court disagreed, concluding that it would strictly interpret the Bankruptcy Code and apply a standard definition of "retain" that clearly was not met by the plan – the Code says the Bank must retain its liens under the plan and it was undisputed that the Bank was not retaining its liens.

CIT minimizes this portion of the *United Chemical* decision because it is clearly inapposite to the facts here – CIT is retaining its liens on all of the Debtor's assets under the Further Modified Plan. Instead, CIT points to the district court's analysis of the Bank's lien on certain insurance proceeds and the treatment of those proceeds under the debtor's plan to support its contentions here. However, that portion of the *United Chemical* court's analysis is equally inapplicable.

In *United Chemical*, the Bank also held a first lien on a manufacturing facility of the debtor (the "Plant"). An industrial accident that occurred before United Chemical filed its bankruptcy case destroyed a portion of the Plant. As a result of this accident, United Chemical received certain insurance proceeds. After receiving these insurance proceeds, United Chemical attempted to obtain the agreement of its secured creditors, including the Bank, to its use of the insurance proceeds to rebuild the Plant. When no agreement was reached, United Chemical filed its bankruptcy case. A portion of the insurance proceeds remained at the time of confirmation of the debtor's plan. Because the Bank had a first lien on the Plant, the Bank had a first lien on the remaining insurance proceeds. Under the debtor's plan, the Bank did not retain its liens on the remaining insurance proceeds. The district court concluded that the fair and equitable test of § 1129(b)(2)(A)(i) was not satisfied because the plan's use of the insurance proceeds "completely disregards [the Bank's] interest in those funds and amounts to a forced dissolution of [the Bank's] liens on those monies." *See United Chem.*, 202 B.R. at 50.

The district court's conclusion in *United Chemical* is consistent with the outcome that would be required under analogous circumstances in accordance with § 1129(b)(2)(A)(ii). For example, if a portion of the Plant had been sold (instead of destroyed by an industrial accident), the debtor's plan could only be confirmed over the Bank's objection under § 1129(b)(2)(A)(ii) if the Bank's lien attached to the sale proceeds and that lien on proceeds was then treated in accordance with § 1129(b)(2)(A)(i) or (iii). Under § 1129(b)(2)(A)(i), the Bank must retain its lien on the sale proceeds until its claim is paid in full. The district court reached the same result with the respect to the insurance proceeds.

CIT cited *In re Sparks*, 171 B.R. 860 (Bankr. N.D. Ill. 1994) to support its contentions at the hearing on the Motion. That case is also inapplicable. In *Sparks*, the secured creditor, Metropolitan Life Insurance Company ("MetLife"), had a lien on an apartment complex and the revenues generated from that complex. Under the debtor's plan, the apartment complex was to be converted to a condominium project. The court concluded that the plan could not be confirmed over MetLife's objection because it failed to satisfy the fair and equitable test under any subsection of § 1129(b)(2)(A).

Under the plan, MetLife was forced to release its liens on its collateral (*i.e.*, the apartment /condominium complex) on a piecemeal basis – MetLife was required to release its lien on each converted condominium unit as it was sold – in exchange for only a portion of the sale proceeds. Specifically, the court concluded that the plan failed to satisfy § 1129(b)(2)(A)(i) because MetLife was not retaining its liens on the apartment/condominium complex until its allowed secured claim was paid in full or § 1129(b)(2)(A)(ii) because MetLife was not receiving all of the proceeds of the individual sales or retaining its liens on all of the proceeds of the individual sales until its allowed secured claim was paid in full.

The decisions in *United Chemical* and *Sparks* do not support CIT's contentions here. CIT is retaining its liens on all of the Debtor's assets until its allowed secured claim is paid in full. While proceeds of pledged accounts will be used to operate the business and make plan payments so long as the Further Modified Plan is not in default, CIT is granted replacement liens on all new accounts as they are generated by the reorganized Debtor's ongoing business operations. CIT will retain its liens on accounts generated by the Debtor's business until its allowed secured claim is paid in full. If the Debtor defaults on the Further Modified Plan, CIT is entitled to foreclose its liens on all of the Debtor's assets, including the then outstanding accounts.[2]

In contrast, the insurance proceeds in *United Chemical* were the replacement collateral for the Bank's lien on the destroyed Plant and the Bank was entitled to retain its lien on that replacement collateral until it was paid in full. If the debtor in *United Chemical* had been permitted to use the insurance proceeds and then defaulted on the plan, the Bank's collateral would no longer be available to satisfy its claims – *i.e.*, the Plant was destroyed and the

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[2]What CIT does not "retain" under the Further Modified Plan is the contractual right provided in the Prepetition Loan Agreement to have a certain amount of accounts and inventory on hand at all times (as noted in the most recent Memorandum Opinion, as a revolving lender CIT advanced new monies to the Debtor under the Prepetition Loan Agreement based upon a formulaic calculation derived from eligible accounts and inventory). Under § 1123(b)(1) and (b)(5) of the Bankruptcy Code, the Debtor's plan can impair CIT's rights under its prepetition contract and the plan can modify the terms of that prepetition contract. CIT is only entitled to "retain" its liens before a plan can be found to satisfy the fair and equitable test of § 1129(b)(2)(A)(i) of the Bankruptcy Code; CIT is not entitled to "retain" all of the terms of its prepetition contract.

replacement collateral for the Plant, the insurance proceeds, was spent – and thus, the court concluded that the Bank was not "retaining" its liens under the plan.

Similarly, in *Sparks*, the sale proceeds of the individual units represented the replacement collateral for MetLife's lien on the complex and MetLife was entitled to retain its lien on that replacement collateral until it was paid in full. If the debtor had been permitted to use the sale proceeds in accordance with the plan and then defaulted on its plan obligations, MetLife's collateral would no longer be available to satisfy its claims – *i.e.*, individual condominium units would be sold and the proceeds from the sale would be spent – and thus, the court concluded that MetLife was not "retaining" its liens under the plan.

b. CIT is not injured by confirmation of the Further Modified Plan. The Further Modified Plan proposes to pay CIT's allowed secured claim in full. CIT is free to pursue Kester on his Guaranty now, or from time to time hereafter, for any amounts not being paid under the Further Modified Plan. CIT is also free to pursue Kester now, or from time to time hereafter, for any tort claims it believes it has against him. Moreover, the Court found that the Further Modified Plan is feasible and that the Debtor should be able to fully perform the Further Modified Plan. However, if the Debtor defaults on its plan payments to CIT, after notice and an opportunity to cure, CIT may foreclose its liens on all of the Debtor's assets and pursue Kester, individually, for those additional amounts without further order of this Court.

3. For at least the reasons articulated in paragraph 2(b) above, the Court finds that CIT is not irreparably injured if a stay of the Confirmation Order pending appeal is not granted.

4. Other parties will be substantially harmed by a stay pending appeal. The Debtor elected to have its case treated as a small business case because it wanted to streamline the

timetable for its potential reorganization. Chapter 11 is an expensive process – literally and figuratively. It is difficult for any business to operate successfully in chapter 11, including small businesses like the Debtor's business. Customers are concerned about the Debtor's ability to successfully reorganize, deliver product to them, and then honor the three year warranty given by the Debtor on that product. Employees are concerned about their jobs. Suppliers are concerned about their ability to get paid. Confirmation and consummation of the Further Modified Plan resolves these uncertainties and permits the Debtor to emerge from its bankruptcy case and repay the prepetition claims of its creditors. Delay in confirmation and consummation of the Further Modified Plan may well cause what would otherwise be a successful reorganization to fail.

The Debtor's President testified that the delay in obtaining an order confirming its plan has caused the Debtor's employees, suppliers and customers to be concerned about whether the Debtor will be able to successfully reorganize and emerge from its bankruptcy case. The Debtor's President clearly believes that the Debtor's business will fail unless the Debtor can implement the now confirmed Further Modified Plan on schedule. While CIT would not be harmed by a failure of the Debtor's efforts to reorganize (because it will, in all likelihood, be paid in full even if the reorganization fails and the Debtor's assets are liquidated), all other creditors will be harmed if the Debtor does not successfully reorganize (in a liquidation, unsecured priority claims and general unsecured claims will receive nothing). The Debtor's employees would also be harmed by the Debtor's failure to reorganize, as would customers whose current product would not be finished and whose warranties on previously delivered post-petition product would not be honored.

5. A stay pending appeal does not serve the public interest. Chapter 11 of the Bankruptcy Code was enacted to permit businesses to successfully reorganize their financial affairs, emerge from their bankruptcy cases, and repay the prepetition claims of their creditors. The Court previously found that the public interest would be served by the issuance of the temporary injunction requested in the Further Modified Plan; and, for the reasons set forth in its prior Memorandum Opinions, found that the Further Modified Plan satisfied all of the requirements for confirmation and should be confirmed. Those findings are supported by a preponderance of the evidence and are not clearly erroneous. The public interest is served by the Debtor's emergence from its chapter 11 case.

6. CIT is not entitled to a stay pending appeal. An Order denying a stay pending appeal will be entered separately.

Signed this 23rd day of February, 2001.

Barbara J. Houser
United States Bankruptcy Judge